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NOT FOR PUBLICATION

MAY 30 2008

HAROLD S. MARENUS, CLERK U.S. BKCY, APP. PANEL OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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TURNER-DUNN HOMES, INC., et al., Debtors,)

RDC CONSTRUCTION, INC.,)

Appellant/Cross-Appellee,)

V.)

OHIO SAVINGS BANK,)

Appellee/Cross-Appellant,)

ROBERT P. ABELE, Chapter 11

Appellee.

BAP Nos. AZ-07-1337-JuKPa AZ-07-1355-JuKPa (Cross-Appeals)

Bk. No. 06-00961-JMM

Adv. No. 06-00106-JMM

MEMORANDUM¹

Argued and Submitted on February 21, 2008 at Phoenix, Arizona

Filed - May 30, 2008

Appeal from the United States Bankruptcy Court for the District of Arizona

Hon. James M. Marlar, Bankruptcy Judge, Presiding.

Before: JURY, KLEIN and PAPPAS, Bankruptcy Judges.

 $^{^{\}rm 1}$ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

This is an appeal and related cross-appeal from the bankruptcy court's judgment finding that Appellant RDC Construction, Inc. ("RDC") had a valid mechanics' lien on certain real property senior to the lien of Appellee and Cross-Appellant, Ohio Savings Bank ("OSB"), in the amount of \$10,974.73, and disallowing the remainder of RDC's claim.²

We AFFIRM the bankruptcy court's ruling that RDC had a valid lien, but that the doctrine of equitable estoppel prevented RDC from asserting a lien senior to OSB's lien in an amount more than \$10,974.73. We VACATE the bankruptcy court's decision to disallow the remainder of RDC's claim and REMAND for further proceedings consistent with this Memorandum.

I. FACTS

Turner-Dunn Homes, Inc. and its related entities (collectively "Turner-Dunn") were involved in developing residential subdivisions located in Pinal County, Arizona. On November 7, 2005, Turner-Dunn contracted with RDC for it to furnish the infrastructure on Parcel FF of the McCartney Center subdivision ("Parcel FF"). RDC commenced its work and on November 22, 2005, timely served Turner-Dunn with its Preliminary Twenty-Day Notice of its mechanics' lien under ARIZ. REV. STAT. § 33-992.01.

Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

 $^{^3}$ The bankruptcy court's Memorandum Decision stated the preliminary notice was "recorded." This was an apparent error, as preliminary notices under Arizona mechanics' lien law are served, not recorded. Ariz. Rev. Stat. § 33-992.01.

RDC invoiced Turner-Dunn at the end of each month for work it completed during that month. When Turner-Dunn became delinquent on several invoices, RDC threatened to foreclose its mechanics' lien. By March 8, 2006, Turner-Dunn owed RDC approximately \$977,310.19.

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Turner-Dunn's cash flow problems occurred in part because it could not close its loan with OSB to refinance the existing loan on Parcel FF. OSB would not fund the loan in the amount of \$750,000 until Turner-Dunn had equity of approximately \$1.25 million in Parcel FF. Of the \$1.25 million, OSB was holding \$500,000 of Turner-Dunn's cash collateral in a pledge account, but Turner-Dunn was short the remaining amount.

In early March 2006, RDC met with Turner-Dunn regarding the outstanding progress payments. To facilitate the loan from OSB and provide Turner-Dunn with the needed equity, RDC agreed to release its mechanics' lien against Parcel FF in the amount of \$778,377.90. Turner-Dunn agreed to pay RDC the full amount released.

Discussions and negotiations between the parties regarding how payment was to occur, however, were never formalized. At one point, Turner-Dunn offered repayment as money became available through future home sales, but RDC never expressly agreed to this payment arrangement. In the end, repayment was based only on a verbal agreement.⁴

Turner-Dunn allegedly gave RDC a payment agreement (the "Note TD") in the amount of \$652,553.91. Apparently, RDC recorded the note on its books based only on Marc Dunn's ("Dunn") personal guarantee that he would pay. George Anderson (continued...)

On April 3, 2006, RDC executed an Unconditional Waiver and Release on Progress Payment (the "Release"). The Release acknowledged that RDC had received a progress payment in the sum of \$778,377.90 for work done on Parcel FF and stated that RDC "does hereby release any mechanic's lien [and] . . . any claim for payment . . . that [RDC] has on the [project]" and that the release "covers a progress payment for all labor, services, equipment or materials furnished to the jobsite . . . through February 28, 2006." Below the signature line in capital letters was the following:

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

On April 19, 2006, OSB advanced \$741,000 to Turner-Dunn. One day later, OSB advanced \$518,000. OSB recorded its lien against Parcel FF around the same time frame.

Turner-Dunn made payments to RDC that totaled \$593,807.76, 5 which RDC applied toward the released amount. By August 2006, RDC had not been fully paid. On August 1, 2006, RDC recorded and served its Notice of Claim of Mechanic's and Materialman's Lien

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^{4(...}continued)

^{(&}quot;Anderson"), a principal of RDC, testified that there was no note and the agreement was verbal.

There is no apparent dispute regarding the amount of the payments made. However, RDC sometimes states it was paid \$593,807.76 but at other times the sum is \$563,922.01. When making its claim calculation, it used the \$563,922.01 figure. OSB, the trustee, and the bankruptcy court consistently used the \$593,807.76 figure. When we calculate the allowed claim amounts later in this decision, we have based that calculation on the \$593,807.76 figure.

against Parcel FF in the amount of \$819,459.38.

On August 14, 2006, Turner-Dunn and its related entities each filed a voluntary chapter 11 petition. The cases were administratively consolidated. On October 3, 2006, the bankruptcy court appointed Robert P. Abele as the chapter 11 trustee. In December 2006, the trustee sold, free and clear of liens, all of Turner-Dunn's residential subdivisions, that sale closing in March 2007. Valid liens attached to the proceeds.

RDC filed a timely proof of claim in the amount of \$819,459.38, designating it as fully secured against Parcel FF based upon its perfected mechanics' lien.

On November 22, 2006, BCI Bebout Concrete filed an adversary proceeding against Turner-Dunn for breach of contract and foreclosure of mechanics' lien. This adversary served as the procedural vehicle for the adjudication of all the mechanics' and materialmen's lien rights against the estate and their relative priorities. The trustee filed an answer to the action along with a third-party complaint against RDC, OSB, and others, which

RDC now concedes that its entire claim is not secured. Rather, it contends its claim is secured in the amount of \$605,003.49. RDC calculates the secured portion of its claim by taking the total billed \$1,382,981.39 plus the \$400 lien fee, less the released amount of \$778,377.90. It contends its unsecured claim is in the amount of \$214,455.89. RDC calculates this portion of its claim by applying all payments made by Turner-Dunn in the amount of \$563,922.01 to the released amount (\$778,377.90 - \$563,922.01 = \$214,455.89). The same number is arrived at by taking the total billed less the amount paid (\$1,382,981.39 - \$563,922.01 = \$819,059.38). The \$819,459.38 claim amount was based on the payment of \$563,922.01. Since the agreed credit sum was \$593,807.76, the actual claim amount should be \$789,773.63.

raised issues primarily about the validity, priority, and extent of each of the liens on Turner-Dunn's various properties.

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A partial summary judgment procedure was used by the parties to address the facial validity of the various mechanics' liens. In OSB's "Joinder in Trustee's Motion for Partial Summary Judgment and Separate Motion for Summary Judgment," OSB alleged that RDC failed to perfect its lien rights because its Preliminary Twenty-Day Notice contained an inadequate description of work and was not served on OSB or signed under oath by someone with knowledge.

The court filed an "Order Re: Summary Judgment (Partial) Involving Lien Claimant" on May 18, 2007, denying OSB's summary judgment, and granting RDC's partial summary judgment motions on the issue, among others, that RDC had a valid lien. The court also found that RDC's lien was senior to OSB's, but the amount of its seniority was still at issue. The trustee also disputed the amount of RDC's secured claim.

On August 2, 2007, the court held an evidentiary hearing to determine the amount of RDC's seniority. On September 4, 2007, the court filed its Memorandum Decision finding that RDC had a secured claim in the amount of \$10,974.73 senior to OSB's lien on Parcel FF. The court disallowed the remainder of RDC's claim.

RDC and OSB timely appealed.

II. JURISDICTION

The bankruptcy court had subject matter jurisdiction pursuant to 28 U.S.C. § 1334 over this core proceeding under § 157(b)(2)(A), (B), and (K). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

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- A. As between OSB and RDC, whether RDC's statement in the Unconditional Waiver and Release of Progress Payment that it had been paid the full lien-release amount estopped it from later denying that it had been paid.
- B. As between the trustee and RDC, what was the effect of the Unconditional Waiver and Release of Progress Payment on RDC's right to a secured or unsecured claim against property of the estate.
- C. Whether RDC's Preliminary Twenty-Day Notice contained an adequate description as is required under ARIZ. REV. STAT. § 33-992.01(C)(1).

IV. STANDARDS OF REVIEW

The proper interpretation of a statute is a legal question that we review de novo. <u>Heath v. Am. Express Travel Related</u>

<u>Servs. Co. (In re Heath)</u>, 331 B.R. 424, 428 (9th Cir. BAP 2005). Whether compliance with a given statute has been established is generally a question of fact, which we review for clear error. Id.

Application of equitable estoppel is reviewed for abuse of discretion. Id. at 429. A bankruptcy court necessarily abuses its discretion if it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. We also find an abuse of discretion if we have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. Id.

State law controls the construction of a contract. <u>Flavor</u>

<u>Dry, Inc. v. Lines (In re James E. O'Connell Co., Inc.)</u>, 799 F.2d

1258, 1260 (9th Cir. 1986). Although contract interpretation involves mixed questions of law and fact, the application of contractual principles is a matter of law. Circle K Corp. v. Collins (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996). We review a bankruptcy court's legal conclusions and application of state law de novo. Id.

V. DISCUSSION

The validity and priority of RDC's mechanics' lien, as well as its amount, are determined under Arizona law. <u>Butner v.</u>
United States, 440 U.S. 48, 54-55 (1979).

Arizona lien law provides laborers and materialmen such as RDC a lien on real property for the amount of materials or labor furnished when they enhance the value of another's property.

<u>United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.</u>, 197

Ariz. 479, 484, 4 P.3d 1022, 1027 (2000). Lien claimants can enforce these rights and pursue remedies directly against the owner of the property. <u>Id.</u> However, they can lose their lien by an intentional waiver or by estoppel, which is applicable when a lienholder, by its acts or conduct, precludes itself from asserting the lien. See 51 Am. Jur. 2d Liens § 59 (2008).

For the waiver and release of a mechanics' lien to be valid in Arizona, it must substantially conform to the forms set forth in Ariz. Rev. Stat. § 33-1008 and be signed by a claimant or its authorized agent. Ariz. Rev. Stat. § 33-1008(A). If the waiver and release comply with the statute, or the claimant was paid in

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 $[\]ensuremath{^{7}}$ They also may lose other rights, depending on the language of the waiver.

full on its claim, the claimant may be estopped from asserting its lien. ARIZ. REV. STAT. § 33-1008(B).

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There are two forms of release under the statute: conditional and unconditional. ARIZ. REV. STAT. § 33-1008(D)(1) and (2). A conditional release becomes effective only after payment is received by the claimant, whereas an unconditional release is effective immediately even if the claimant has not been paid. Janas v. Endo Steel, Inc. (In re JWJ Contracting Co., Inc.), 287 B.R. 501, 510 (9th Cir. BAP 2002).

The bankruptcy court found that the Release signed by RDC followed the statutory format and contained the requisite language for an unconditional waiver and release under ARIZ. REV. Stat. \S 33-1008(D)(2).

A. The Amount of RDC's Lien Senior to OSB's Lien

Between OSB and RDC, the issue was whether the Release estopped RDC from denying that it was paid the full lien-release amount. The bankruptcy court found an estoppel because, in the Release, RDC represented that it had been paid the full lien-release amount to induce OSB, an unsuspecting lender, to disburse funds to Turner-Dunn. The court found the Release unambiguously stated that RDC had been paid in full the lien-release amount. Accordingly, in determining whether RDC had a lien claim senior to OSB's lien, the court subtracted the released amount from the total amount due to RDC and applied all payments made by Turner-Dunn to RDC to invoices for work done after February 28, 2006.

The bankruptcy court's finding that RDC's statement that it had been paid the full lien-release amount created an estoppel is reviewed for abuse of discretion. To find equitable estoppel,

three elements must be met: (1) the party to be estopped commits acts inconsistent with a position it later adopts, (2) reliance by the other party, and (3) injury to the latter resulting from the former's repudiation of its prior conduct. <u>Valencia Energy</u> Co. v. Ariz. Dep't of Revenue, 191 Ariz. 565, 575-76, 959 P.2d 1256, 1267-68 (1998).

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Regarding the first element, we agree with the bankruptcy court's finding that the Release unambiguously stated that RDC had been paid. See Amfac Distrib. Corp. v. J.B. Contractors, Inc., 146 Ariz. 19, 23, 703 P.2d 566, 570 (1985) (noting that the scope and effect of a lien waiver is determined from the language of the document when it is unambiguous). Thus, RDC was estopped from denying that it had been paid the full lien-release amount after OSB funded its loan, assuming the other two elements for estoppel were met.

Regarding the second element of reliance, OSB, the party claiming estoppel, had the burden of demonstrating that it actually relied on the Release before funding Turner-Dunn's loan and that its reliance was reasonable. Valencia Energy Co., 191 Ariz. at 576. Reasonable reliance required a showing that OSB acted in good faith and that it was not on notice to make further inquiries. Id.; Suburban Pump & Water Co. v. Linville, 60 Ariz. 274, 283, 135 P.2d 210, 214 (1943) (noting that one who acts "with a careless indifference to information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel").

RDC contends that the record establishes that OSB could not have relied on any release of RDC's claim beyond the \$778,377.90

amount because OSB never contacted RDC at any time to find out what RDC had been paid or was being paid. Yet, RDC points to no evidence in the record that would have put OSB on notice to make these inquiries when the plain language in the Release, which followed the statutory format, stated that RDC had already been paid.

RDC also maintains that OSB could not have relied on the Release in connection with the funding of Turner-Dunn's second draw request in the amount of \$518,000. However, the record shows that RDC gave OSB its monthly progress invoice dated March 31, 2006, showing the lien-release amount paid in full. Jim Sawitzke, the bank's representative, testified that the invoice was "important" for OSB in funding the second draw. He also testified that "[w]e would never fund a draw request if we hadn't had evidence that the previous draw request - that trades for the previous request had been made." RDC has cited no evidence in the record that refutes this testimony.

Regarding the third element of equitable estoppel, RDC's repudiation of its statement in the Release that it had been paid would result in a mechanics' lien senior to OSB's lien, which OSB secured while relying on RDC's statement. This result is injurious. The bankruptcy court's decision to apply all post-release payments to post-release invoices vitiates this injury and applies the elements of estoppel without clear error.

Accordingly, we agree with the bankruptcy court's accounting set forth in its Memorandum Decision, which leaves RDC with a secured claim senior to OSB's lien in the sum of \$10,974.13 and nothing

more.8

B. The Amount and Nature of RDC's Claim Against the Estate9

At the outset, we note that the trustee's avoidance rights under § 544 are not implicated in this appeal. In its Memorandum Decision the court referred to the trustee's avoidance powers under § 544 in relation to RDC's claim. At oral argument, however, the trustee clarified that he was contesting allowance of RDC's claim in his status as the representative of the bankruptcy estate.

RDC also assigns error to the court's failure to credit against the pre-Release invoices the payments of \$193,807.76 paid prior to the Release date of April 13, 2006. The bankruptcy court, however, found that RDC's books and records were inconsistent with its assertion that the payments of \$193,807.76 were payments received before the date the Release was signed. On this record, we perceive no error in the court's review of the documentary evidence.

⁹ In the Joint Pretrial Statement, filed by the trustee and RDC only, the parties characterized the nature of the action as one to determine the amount of RDC's claim and whether it was secured or unsecured. The parties represented that there were no contested factual issues and set forth the issues of law as follows: (1) whether the Release waived any mechanics' lien claim against Turner-Dunn for \$778,377.90; (2) whether RDC is estopped from asserting a secured claim in the amount of \$778,377.90; and (3) whether RDC accepted the "Note TD" in partial payment for its services, and, therefore, its lien must reduced by the amount of the "Note TD".

The court, in passing, mentions the trustee's rights under \S 544. See Memorandum Decision 8:18-19; 10:4-5. Moreover, to compound the confusion, both the Appellee and Appellant make cursory reference to the trustee's rights under \S 544. See Appellee's Opening Br. at p. 15; Appellant's Reply Br. at p. 11.

Section 544(a) grants the trustee "the rights and powers of a hypothetical creditor who obtained a judicial lien on all the property in the estate at the date the petition in bankruptcy (continued...)

Under § 541(a), 12 the trustee succeeds to the debtor's rights at the time of its filing and is subject to such claims and defenses as might have been asserted against the debtor but for the filing. Equitable Bank of Littleton, N.A. v. Jobin (In re Twenty-Four Hour Nautilus Swim & Fitness Ctr., Inc.), 81 B.R. 71, 74 (D. Col. 1987). See also Carroll v. Tri-Growth Centre City, Ltd. (In re Carroll), 903 F.2d 1266, 1271 (9th Cir. 1990) (noting that a debtor's rights under a contract are not enlarged under the Code).

While OSB could rely upon the doctrine of equitable estoppel to enforce the Release, the trustee does not seek application of the doctrine, nor could be because Turner-Dunn was not misled to its detriment. In reality, Turner-Dunn benefitted from the Release because without it Parcel FF could not have been refinanced.

The trustee maintained in his brief that Turner-Dunn and RDC agreed that payment of the released amount would come from future home sales, as evidenced by the "Note TD." The trustee asserted that this agreement was binding. Sec. Trust & Sav. Bank v. June, 38 Ariz. 513, 517, 1 P.2d 970, 971 (1931). Accordingly, the trustee argued that payments made to RDC after the issuance of the "Note TD" and Release from sources other than home sales

^{24 (...}continued)

was filed." Neilson v. Chang (In re First T.D. & Inv., Inc.), 253 F.3d 520, 526 (9th Cir. 2001). Under § 544(a), the trustee steps into the shoes of a lien creditor, with all its rights and powers under state law, and not into the shoes of the debtor.

 $^{^{\}rm 12}$ Section § 541(a) provides that all legal or equitable interests of the debtor become property of the estate.

could not be applied to RDC's unsecured claim and must instead reduce its secured claim. The trustee asserts that he is entitled to the same effect of the lien release as the lender because, in pertinent part, ARIZ. REV. STAT. § 33-1008(A) provides "[a]ny written consent given by any claimant pursuant to this section is unenforceable unless the claimant executes and delivers a waiver and release. This waiver and release is effective to release the property for the benefit of the <u>owner</u>.

. . ." ARIZ. REV. STAT. § 33-1008(A) (emphasis added).

We agree that the trustee is entitled to the same benefit of the lien release as OSB: any payments made on the total sums due RDC after the release date should be applied against the new accruing lien rights of RDC as to TD, the owner, same as to OSB, the lender. Using the bankruptcy court's accounting, this leaves RDC with the same \$10,974.73 priority secured claim against the estate as against OSB.

Here our analysis, however, parts from that of the bankruptcy court, which concluded, without adequate findings, that as a result of the Release RDC was not entitled to any claim at all. As discussed above, under § 541 the trustee succeeds to the position of the debtor. The undisputed testimony of both

The bankruptcy court appeared to base this conclusion on an undeveloped § 544 theory, a theory neither asserted now by the trustee nor supported by the factual findings made by the court. In the discussion section of the Memorandum Decision, the court used such terms as "hold out to the world" and "held out to others" when referring to RDC's assertion in the Release that it had been paid the lien Release amount. The evidence in the record shows the Release was not a recorded document and was seen only by OSB and TD.

RDC and TD witnesses at trial supports an outcome that would leave RDC with an unsecured claim for its unpaid balance. This outcome also finds support under <u>JWJ Contracting</u>, 287 B.R. at 508-509, (which rejected the new value theory of the preference defendant only because it was based on a secured claim which had been released, not an unsecured claim which the contractor continued to hold), by the undisputed facts in the pretrial order, and by analysis under Arizona contract law.

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The record reflects discussions regarding payment from future home sales, but those discussions never resulted in an agreement. On that point the parties and the bankruptcy court agree. 14 That those discussions did not result in a further writing is not fatal to the parties' agreement for repayment. Phoenix Orthopaedic Surgeons v. Peairs, 164 Ariz. 54, 57-58, 790 P.2d 752 (Ariz. Ct. App. 1989) (stating that there can be a modification of a written agreement without a further writing). The testimony shows that RDC also relied on Dunn's personal assets to pay at least a portion of the lien-release amount. This agreement was partially performed because Dunn testified that a portion of the money paid to RDC came from personal funds that he borrowed on his house and his mother's house. bankruptcy court's accounting, which we will not disturb, applied those payments to the unreleased lien amounts. That done, the oral agreement of the parties would leave RDC with an unsecured claim for the unpaid balance (total billings of \$1,382,981.39 minus the stipulated credits of \$593,807.76 would leave an unpaid

See Memorandum Decision 4:24-25.

amount of \$789,173.63).

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We are mindful of the strong language in the bankruptcy court's Memorandum Decision which expresses a finding of the court that the joinder of RDC with the debtor in creating a subterfuge to OSB was a wrong-doing that should be "punished" by the court's decision. The record and law do not support that "punishment" being total loss of RDC's unsecured claim. However, the Code¹⁵, under appropriate circumstances, gives the court the authority to treat even an unsecured claim differently than others. For this reason, we vacate that portion of the bankruptcy court's Judgment that allows RDC no claim beyond its priority lien of \$10,971.73 and remand this issue to the bankruptcy court for further proceedings, including, if the court deems appropriate, the entry of additional findings to support the treatment of the remainder of RDC's claim.

C. Interest and Attorney Fees

RDC contends the bankruptcy court erred by not awarding it prejudgment interest and legal fees and costs pursuant to Ariz. Rev. Stat. \S 32-1129.01(K) and (M).

Subsection (K) provides that if the owner does not make timely progress payments, "the owner shall pay the contractor interest at the rate of one and one-half per cent a month . . . on the unpaid balance, or at a higher rate as the parties to the construction contract agree." ARIZ. REV. STAT. § 32-1129.01(K). Section 4.1.3 of the contract between Turner-Dunn and RDC

 $^{^{15}\,}$ See, for example, § 510(c), which provides for equitable subordination in a proper circumstance.

provides that payments due and unpaid shall bear interest from the date the payment is due at the legal rate prevailing from time to time at the place where the project is located. RDC asserts that it is entitled to 18% interest.

OSB contends that the statute applies only in an action against the owner, Turner-Dunn, to collect payments, not in an action to foreclose a mechanics' lien. However, prejudgment interest is a lienable item and we can discern no bar to an award of interest on RDC's claim here. See 53 Am. Jur. 2d Mechanics' Liens § 249 (2008). Accordingly, we hold that RDC is entitled to interest on its claim, but leave it to the bankruptcy court to determine when interest began to accrue and the amount. 16

Subsection (M) provides for an award of attorneys' fees only to the "successful party." The trial court has discretion to determine who is the successful party. Schwartz v. Farmers Ins.

Co. of Az., 166 Ariz. 33, 38, 800 P.2d 20, 25 (1990). "The use of a 'percentage of success factor' test to determine the relative success of the parties with regard to the various claims has been held to be appropriate . . . as has a 'totality of the litigation' test." Id. The record does not reflect any consideration of whether RDC was a successful party. Moreover, our decision here grants RDC a greater degree of success than under the bankruptcy court's ruling. Therefore, on remand, the bankruptcy court should determine whether RDC has any right to

The interest should be separately calculated on the senior secured claim and the junior secured claim. It should also be calculated to the date of the petition on the unsecured claim and as appropriate thereafter.

its attorneys' fees and costs and, if so, determine the appropriate amount.

D. The Cross-Appeal

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1. The Substitution Motion

While this appeal was pending, OSB and WRI Investments III, L.L.C. ("WRI") filed a motion to substitute WRI in place of OSB as the real party in interest on the grounds that all of the parties in the adversary proceeding, except RDC, entered into a settlement agreement. The settlement provided that OSB would immediately receive certain funds which would not be subject to disgorgement. WRI and the other approximately fourteen mechanics' lien claimants, except RDC, would receive funds that included the amount of RDC's claim and would be distributed under a formula only after a final judgment determining the amount of RDC's claim was entered. Therefore, WRI and the other claimants bear the risk of any modification to RDC's judgment that was entered in the bankruptcy court. The motion was premised on Fed. R. Civ. P. 25(c).

Fed. R. Civ. P. 25(c) provides that "[i]n the case of a transfer of interest the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). "Rule 25(c) is not designed to create new relationships among parties to a suit but is designed to allow the action to continue unabated when an interest in the lawsuit changes hands." Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal), 207 F.3d 595, 598 (9th Cir. 2000).

An order of joinder is merely a discretionary determination by the court that the transferee's presence would facilitate the conduct of the litigation. <u>Id.</u>; <u>See Minn. Mining & Mfg. Co. v.</u>

<u>Eco Chem, Inc.</u>, 757 F.2d 1256, 1263 (Fed. Cir. 1985) (noting that substitution under Rule 25(c) is purely a matter of convenience).

Because it makes no practical difference whether WRI is joined in this appeal, we deny the motion.

2. The Merits of the Cross-Appeal

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Under ARIZ. REV. STAT. § 33-992.01(C)(1), the Preliminary
Twenty-Day Notice required to be attached to a mechanics' lien
must provide "[a] general description of the labor, professional
services, materials, machinery, fixtures or tools furnished or to
be furnished." OSB asserts in its cross-appeal that RDC's
Preliminary Twenty-Day Notice contained an inadequate description
of the work because it merely stated "materials and/or labor."

OSB contends the statutory requirements for mechanics' liens must
be strictly followed to perfect a lien. MLM Constr. Co., Inc. v.
Pace Corp., 172 Ariz. 226, 229, 836 P.2d 439 (1992).

In deciding whether the statutory requirements should be strictly enforced, the <u>MLM</u> court acknowledged that the underlying purpose of the mechanics' lien statutes was to protect laborers and materialmen who enhance the value of another person's property and, therefore, they must be liberally construed. To harmonize the two principles, one of strictness and the other of liberality, the court found that "substantial compliance not inconsistent with the legislative purpose is sufficient." <u>Id.</u> at 228.

While we acknowledge the description in RDC's preliminary

notice is cursory, we do not disagree with the bankruptcy court's finding that RDC's lien was valid and therefore met the requirements for substantial compliance. <u>See also Ray Heating Prods. Inc. v. Miller</u>, 74 Nev. 124, 125, 324 P.2d 237, 238 (1958) (finding that deficiencies in the description of the work does not render a mechanics' lien fatally defective).

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VI. CONCLUSION

For the reasons stated herein, we AFFIRM the bankruptcy court's ruling that RDC had a valid lien on Parcel FF and that the doctrine of equitable estoppel prevented RDC from asserting a lien senior to OSB's lien in any amount over \$10,974.73. We VACATE the bankruptcy court's decision to disallow the remainder of RDC's claim and REMAND for further proceedings consistent with this Memorandum.